(2)

Supreme Court, U.S.
FILED
DEC 2 2000

No. 00-595

In the Supreme Court of the United States

MAIER, MCILNAY & KERKMAN, LTD., PETITIONER

v.

IRA BODENSTEIN, UNITED STATES TRUSTEE

AND

MILWAUKE ENGRAVING COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

ROBERT M. LOEB
NEACLESA ANDERSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTION PRESENTED

Whether attorneys who are not "disinterested persons," under Section 327(a) of the Bankruptcy Code, are authorized to receive payment for fees and expenses under 11 U.S.C. 503(b)(1)(A).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Albrecht, In re, 245 B.R. 666 (B.A.P. 10th Cir. 2000), aff'd, No. 00-8022, (10th Cir. Dec. 4, 2000)	9
Crivello, In re, 134 F.2d 831 (7th Cir. 1998)	6, 7, 8
Federated Dep't Stores, Inc., In re, 44 F.3d 1310 (6th Cir. 1995)	9, 10, 11
F/S Airlease II, Inc., In re, 844 F.2d 99 (3d Cir. 1988)	9
Grabill Corp., In re, 983 F.2d 773 (7th Cir. 1993)	4
Hohn v. *United States*, 524 U.S. 236 (1998)	8
Keren Ltd. P'ship, In re, 189 F.2d 86 (2d Cir. 1991)	8
Middleton Arms, Ltd. P'ship, 934 F.2d 723 (6th Cir. 1991)	10
Monument Auto Detail, Inc., In re, 226 B.R. 219 (B.A.P. 9th Cir. 1988)	9
Morales v. *TWA*, 540 U.S. 374 (1992)	7
Raleigh v. *Illinois Dep't of Revenue*, 120 S. Ct. 1951 (2000)	8
Singson, In re, 41 F.3d 316 (7th Cir. 1994)	4, 9
United States v. *Balsys*, 524 U.S. 666 (1998)	7

Statutes:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:	
11 U.S.C. 101(14)(E)	2
11 U.S.C. 326	3
11 U.S.C. 327	3, 6, 8, 9
11 U.S.C. 327-330	7
11 U.S.C. 327(a)	2, 3, 9, 10, 11

Statutes—Continued: Page

11 U.S.C. 328 3
11 U.S.C. 329 3
11 U.S.C. 330 ..... 3, 6, 8, 9
11 U.S.C. 330(a) 4, 6, 7, 11
11 U.S.C. 330(a)(1) 3
11 U.S.C. 330(a)(1)(A) 3, 6
11 U.S.C. 503 ..... 4, 8
11 U.S.C. 503(b) 3, 6, 7
11 U.S.C. 503(b)(1) 7
11 U.S.C. 503(b)(1)(A) 3, 4, 5, 6, 7, 8, 9, 11
11 U.S.C. 503(b)(2) 4, 6, 7, 8
11 U.S.C. 507(a)(1) 4
11 U.S.C. 1101(1) 2
11 U.S.C. 1103 3

Miscellaneous:

6 *Collier on Bankruptcy*, (Lawrence P. King ed., 15th ed. rev. 2000) 9

In the Supreme Court of the United States

No. 00-595

MAIER, MCILNAY & KERKMAN, LTD., PETITIONER

v.

IRA BODENSTEIN, UNITED STATES TRUSTEE

AND

MILWAUKE ENGRAVING COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 219 F.3d 635. The opinion of the district court (Pet. App. 19a-30a) is unreported. The opinion of the bankruptcy court (Pet. App. 9a-18a) is reported at 230 B.R. 370.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2000. The petition for a writ of certiorari was filed on October 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Milwaukee Engraving Company filed an application with the bankruptcy court to employ petitioner Maier, McIlnay & Kerkman, Ltd., as general counsel for its Chapter 11 bankruptcy estate, pursuant to 11 U.S.C. 327(a)[1] of the Bankruptcy Code. Pet. App. 2a. Section 327(a) requires Chapter 11 debtors-in-possession[2] to obtain a bankruptcy court's authorization to employ attorneys to assist them in the Chapter 11 case, and provides that a bankruptcy court will approve the employment of attorneys only if they are "disinterested persons" who hold no "interest adverse to the estate."[3]

An affidavit accompanying petitioner's application disclosed that petitioner represented Black Hawk Label Company, Inc., a company that owed $78,000 to Milwaukee Engraving, in connection with Black Hawk's sale of its assets to a third party. Pet. App. 10a. The proceeds from the sale of Black Hawk's assets

---

[1] Section 327(a) states that, "[e]xcept as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title. [11 U.S.C. §§ 101 et seq.]" Pet. App. 31a.

[2] When a debtor corporation is permitted to retain control of its property during a Chapter 11 reorganization, rather than having to turn its property over to a trustee, the corporation is referred to as a "debtor-in-possession." See 11 U.S.C. 1101(1).

[3] A "disinterested person" is defined under 11 U.S.C. 101 (14)(E) as a person that "does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor * * * or for any other reason[.]" Pet. App. 31a-32a.

were to be used to pay Black Hawk's debt to Milwaukee Engraving, but only after petitioner had collected its fees in connection with the sale. *Id.* at 2a.

Respondent United States Trustee objected to the application, arguing that, because of its representation of Black Hawk, petitioner could not qualify as a "disinterested person" free from interests materially "adverse to the estate," and thus was not eligible to be employed pursuant to Section 327(a). Pet. App. 2a, 10a.

Although the "demands of its calendar" prevented it from ruling on the application before petitioner had begun its work on the case, the bankruptcy court denied the application, citing the adverse interest created by petitioner's representation of Black Hawk in connection with the sale of the company's assets. Pet. App. 2a, 16a. Petitioner did not appeal the denial. *Id.* at 11a.

2. Petitioner subsequently filed an application for approximately $15,000 in fees and costs it incurred in this case. Pet. App. 2a. Petitioner argued that, even though the bankruptcy court's denial of the employment application rendered it ineligible to be compensated pursuant to 11 U.S.C. 330,[4] it could be awarded all of its fees and costs pursuant to 11 U.S.C. 503(b)(1)(A).[5]

---

[4] Section 330(a)(1) authorizes bankruptcy courts to award "reasonable compensation" and reimbursement of expenses to attorneys employed under Section 327. Specifically, it states that, "[a]fter notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award * * * a professional person employed under sections 327 or 1103 [providing for employment of agents to represent creditors' committees] * * * reasonable compensation for actual, necessary services." 11 U.S.C. 330(a)(1)(A).

[5] Section 503(b) of the Code authorizes bankruptcy courts to allow certain claims for "administrative expenses." Such claims

Pet. App. 12a. This provision authorizes bankruptcy courts to allow those administrative expenses that are necessary to preserve the bankruptcy estate, including "commissions for services rendered after the commencement of the case." The United States Trustee opposed the request, noting that the court of appeals' decision in *In re Singson*, 41 F.3d 316 (7th Cir. 1994), established that courts have no authority under Section 503 to award attorney's fees that have not been approved under any other section of the Code. Pet. App. 12a.

The bankruptcy court awarded petitioner the required fees and costs pursuant to Section 503(b)(1)(A). The bankruptcy court reasoned that "[n]othing in the plain language of [Section] 503(b)(1)(A) would appear to preclude" it from granting the application, and that petitioner's application satisfied conditions that dicta in *In re Grabill Corp.*, 983 F.2d 773 (7th Cir. 1993), suggested might be appropriate.[6] Pet. App. 12a-16a. Because petitioner had promptly filed its application for employment and the delay in denial was based on the

---

have first priority in distribution (11 U.S.C. 507(a)(1)). Subsection 503(b)(1)(A) identifies administrative expenses as including "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." Pet. App. 32a. Subsection (b)(2) authorizes courts to allow, as administrative expenses, compensation and reimbursement awarded under Section 330(a). 11 U.S.C. 503(b)(2).

[6] In *Grabill*, the court of appeals suggested (983 F.2d at 777) that Section 503(b)(1)(A) might be used to "relieve the rigidity of section 330" in circumstances where a lawyer has filed his application for employment as early as practicable, could not defer performing critical legal work for the debtor, had no reason to believe that his application would be turned down, and had performed transactions of benefit to the debtor-in-possession.

demands of the court's calendar, the bankruptcy court concluded that it would be inequitable to disallow petitioner's expenses. *Id.* at 16a. Thus, the bankruptcy court's decision to award attorney's fees under Section 503(b)(1)(A) was principally grounded in equity.

The United States Trustee appealed to the district court, and the district court affirmed, adopting the bankruptcy court's reasoning. Pet. App. 24a-28a. The United States Trustee then filed an appeal to the Seventh Circuit.

3. The court of appeals reversed. Reasoning that *Singson* constituted controlling authority, the court of appeals explained, "*Singson* concluded that it would vitiate the limitations of [Section] 327 if a bankruptcy court could deny an application under that section and order the estate to pay for the legal services anyway." Pet. App. 4a. The court of appeals reasoned that, "the structure of [Section] 503(b) strongly implies that professionals eligible for compensation must receive it under [Section] 503(b)(2)—which depends on authorization under [Section] 330 or [Section] 1103(a)(and thus on approval under [Section] 327)." *Ibid.* The court of appeals observed that, "[o]ne might as well erase [Section] 503(b)(2) from the statute if attorneys may stake their claims under [Section] 503(b)(1)(A) even when ineligible under [Sections] 327, 330 and 503(b)(2)." *Ibid.*

Accordingly, the court of appeals held that *Singson* conclusively answered the question at issue: "may a bankruptcy court compensate an attorney for services despite denying an application under [Section] 327?"—with an unqualified "no." Pet. App. 4a. The court also noted that its decision in *Singson* was consistent with that of every other appellate court that had considered the matter. *Id.* at 8a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly relied on the structure of Section 503(b) to conclude that "professionals eligible for compensation must receive it under [Section] 503(b)(2)—which depends on authorization under [Section] 330 or 1103(a)—(and thus on approval under [Section] 327)." Pet. App. 4a. Sections 327 and 330 subject the employment and compensation of attorneys to exacting prophylactic measures designed to protect the interests of all interested parties. See *In re Crivello*, 134 F.3d 831, 835-836 (7th Cir. 1998). Under Section 327, a bankruptcy court may employ attorneys to represent a bankrupt estate only if they do not hold or represent an interest adverse to the estate, and are "disinterested persons." 11 U.S.C. 327. Section 330(a)(1)(A) authorizes courts to award "reasonable compensation" and reimbursement of expenses to attorneys "employed under section 327." 11 U.S.C. 330(a)(1)(A). Section 503(b)(2) authorizes courts to allow, as administrative expenses, compensation and reimbursement awarded under Section 330(a). 11 U.S.C. 503(b)(2).

Construing these statutes together, the court of appeals correctly concluded that petitioner was not entitled to compensation under Section 503(b)(1)(A) because compensation for attorneys was governed by Section 503(b)(2). Pet. App. 4a. Since petitioner's application for employment was rejected pursuant to Section 327, by the terms of these provisions, compensation for fees and costs could not be awarded under Section 330(a) or 503(b)(2).

Petitioner contends that Section 503(b)(1)(A) of the Code permits courts to authorize payment of attorney's fees, even when an employment application has been denied under Section 330(a) of the Code. Pet. 15. The court of appeals correctly rejected that argument. The Code's plain language specifies that attorney's fees are to be awarded by a court pursuant to a stringent set of guidelines and constraints set out in Sections 327-330. Section 503(b)(1)(A) by its terms does not expand those limitations, since it does not authorize courts to "award" attorney's fees; it simply permits the allowance of certain administrative expenses. Nor may this omission reasonably be considered an oversight, in light of the fact that the very next subsection of Section 503(b) specifically authorizes the "allowance" of attorney's fees that *have* been "awarded" pursuant to Section 330(a). 11 U.S.C. 503(b)(2). "[T]he cardinal rule to construe provisions in context" (*United States* v. *Balsys*, 524 U.S. 666, 673 (1998)) prohibits reading the term "allow[]" in Section 503(b)(1) as including the meaning "award," because the next subsection of the statute treats the "award" and the "allowance" of fees as separate, cumulative requirements. Cf. *Crivello*, 134 F.3d at 837 ("[a] reviewing court may not insert additional language into the Code to conform it with the court's view of bankruptcy law").

Petitioner's contrary reading of Section 503(b)(1)(A) also contravenes at least two other bedrock principles of statutory construction. First, it permits a general provision (Section 503(b)(1)(A)) to govern the provision (Section 503(b)(2)) dealing specifically with the allowance of attorney's fees, contrary to the principle that "it is a commonplace of statutory construction that the specific governs the general." *Morales* v. *TWA*, 504 U.S. 374, 384 (1992). Second, it renders ineffective the

array of provisions specifically authorizing—and constraining—the courts' authority to award attorney's fees, contrary to the principle that "[courts should be] reluctant to adopt a construction making another statutory provision superfluous." *Hohn* v. *United States*, 524 U.S. 236, 249 (1998); accord *Crivello*, 134 F.3d at 839 (preferring an interpretation that "gives full effect" to both of the two relevant Code provisions). As the court of appeals correctly observed, "[o]ne might as well erase [Section] 503(b)(2) from the statute if attorneys may stake their claims under [Section] 503(b)(1)(A) even when ineligible under [Sections] 327, 330 and 503(b)(2)." Pet. App. 4a.

Finally, the court of appeals correctly ruled that Section 503(b)(1)(A) could not be used, in equity, to "defeat the principal function of [Section] 327 by requiring the estate to compensate a law firm that labored under a conflict of interest." Pet. App. 5a. Thus, the court of appeals properly reversed the decisions of the bankruptcy and district courts, finding that their attempt to avoid the plain language of Sections 327, 330 and 503(b)(2) violated the principle enunciated by this Court in *Raleigh* v. *Illinois Dep't of Revenue*, 120 S. Ct. 1951, 1957 (2000), that "[b]ankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law * * * but are limited to what the Bankruptcy Code itself provides." Pet. App. 4a-5a.

2. In recognizing these principles, and rejecting the use of Section 503 to award attorney's fees that have not been authorized pursuant to any other provision of the Code, the court of appeals' ruling here is fully consistent with that of every other court of appeals that has addressed the issue. See *In re Keren Ltd. P'ship*, 189 F.3d 86, 88 (2d Cir. 1999) (per curiam) ("[i]t is plain

from the Code that compensation for professional services will only be an administrative expense when approved by the court") (affirming the lower courts' denial of a professional's application for compensation pursuant to Section 503(b)(1)(A) because the services were not authorized under Sections 327 and 330); *In re F/S Airlease II, Inc.*, 844 F.2d 99, 108-109 (3d Cir. 1988)("The authority to pay administrative expenses for professionals * * * is found not in section 503(b)(1)(A) but in section 503(b)(2) * * * . If [the professional] were able to be compensated under section 503(b)(1)(A), it would render section 327(a) nugatory and would contravene Congress' intent in providing for prior approval") (cited in *Singson*, 41 F.3d at 320); *In re Monument Auto Detail, Inc.*, 226 B.R. 219 (B.A.P. 9th Cir. 1998); *In re Albrecht*, 245 B.R. 666 (B.A.P. 10th Cir. 2000), aff'd, No. 00-8022 (10th Cir. Dec. 4, 2000); see also 6 *Collier on Bankruptcy* § 943.03[3][b][i] (Lawrence P. King ed., 15th ed. rev. 2000) ("section 503(b)(1) can hardly be a basis for imposing administrative liability for professional compensation[—i]f section 503(b)(1) was a sufficient statutory basis for allowing such claims, sections 328-331 would be rendered superfluous").

Contrary to petitioner's argument (Pet. 5-10), the court of appeals' decision does not conflict with *In re Federated Dep't Stores, Inc.*, 44 F.3d 1310 (6th Cir. 1995). In *Federated Department Stores*, the debtor corporation asked the bankruptcy court for permission to hire Lehman Brothers as a financial advisor to aid it in developing a reorganization plan. The Trustee objected, arguing that Lehman Brothers was not a "disinterested person" as defined under Section 327(a) of the Code. *Id.* at 1313. However, the bankruptcy court rejected this argument, holding that equitable prin-

ciples and the need for a quick and effective reorganization warranted departure from the strict language of the statute. *Ibid.* Although the Trustee appealed the decision to the district court, that court waited three years before issuing a ruling. By that time, the reorganization was complete, and Lehman Brothers had received interim compensation pursuant to the bankruptcy court's order. *Id.* at 1314. During the pendency of the appeal, the Sixth Circuit decided *In re Middleton Arms, Ltd. Partnership*, 934 F.2d 723 (1991). There, the court of appeals affirmed the district court's holding that equitable principles could not override the plain and unambiguous language of Section 327(a). *Id.* at 725. When it finally took up the issue, the district court in *Federated Department Stores* distinguished *Middleton Arms*, holding that the decision to award fees was within the bankruptcy court's discretion. 44 F.3d at 1315. It therefore granted Lehman Brothers' final request for compensation and reimbursement, over the Trustee's objections.

The Sixth Circuit reversed, ruling that *Middleton Arms* prevented the award of compensation to Lehman Brothers when it was not a disinterested party under Section 327(a) and that the court's equitable powers could not be used to contravene the plain and unambiguous language of the statute. 44 F.3d at 1319. Lehman Brothers was thus ordered to return any proceeds received after June 6, 1991, the date on which *Middleton Arms* was decided. The court of appeals reasoned that prior to this date, the issue had not been definitively decided in the Circuit, but that after the decision in *Middleton Arms* was rendered, Lehman Brothers was on notice that it was not a valid or legitimate financial advisor. *Id.* at 1320. This was an equitable remedy, expressly limited to the unique facts

of that case, where Lehman Brothers was being ordered to return fees that had already been distributed. *Ibid.*

Federated Department Stores can thus be distinguished on the grounds that Section 503(b)(1)(A) was not the basis on which an equitable remedy was fashioned, and that the remedy reached was expressly limited to the unique facts of that case. Further, *Federated Department Stores* is consistent with the holding reached by the court of appeals here, to the extent that it reaffirms the general principle that equity cannot be invoked to contravene the plain and unambiguous requirements of Sections 327(a) and 330(a). 44 F.3d at 1319-1320.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

ROBERT M. LOEB
NEACLESA ANDERSON
Attorneys

DECEMBER 2000